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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 217

BENJAMIN STEIN, RENA STEIN AND HENRY KUTNER, DOING BUSINESS AS REGLOR OF CALIFORNIA,

Petitioners,

vs.

EXPERT LAMP COMPANY, a CORPORATION,

Respondent.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

WILL FREEMAN,
GEORGE E. FROST,
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Of Counsel:
C. A. MIKETTA,
W. W. GLENNY.

September 6, 1951.

THE BLAKELY PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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Respondent states:

> "There is no conflict between the decisions of any of the Circuit Courts of Appeal that designs for articles of manufacture *may* be protected only by *design patents* under the PATENT LAWS, * * *." (p. 9.)

The fact is that the Court of Appeals for the Second Circuit has twice held copyrights to be infringed by articles of manufacture (*Fleischer Studios* v. *Freundlich,* 73 F. (2d) 276 (1934) ("Betty Boop" cartoon character reproduced by defendant as a doll—plaintiff also manufactured dolls through licensee); *King Features* v. *Fleischer,* 299 Fed. 533 (1924) ("Spark Plug" cartoon character reproduced as a doll)). Also, in *Jones Bros.* v. *Underkoffler,* 16 Fed. Supp. 729 (M. D. Pa., 1936), the court, after detailed analysis, concluded that a work of art in the form of a cemetery memorial is copyrightable.

The Copyright Office considers that the Copyright Code and decisions support the copyrightability of a work of art, even though it may be embodied in a lamp or other object of use (Petition, p. 13). By Regulation 202.8 (Petition, p. 3) that Office has extended an invitation to creators of such works of art to procure copyright registration. Each year hundreds of such copyrights, solemnly issued under the seal of the Copyright Office, are granted and relied upon (Petition, p. 6).

The decision below is in irreconcilable conflict with the above decisions and the practice of the Copyright Office. The conflict can be dispelled only by a decision of this Court. It cannot be resolved by refusal to face its existence (Brief, p. 9); misreading the Copyright Regulation (Brief, p. 10); importing non-existent mandatory language into the Design Patent Law and decisions (Brief, pp. 6-8); or by mechanically listing the respective characteristics of copyrights and design patents (Brief, pp. 5, 11-17).

The important point is that the Copyright Office and the prior decisions, on one hand, and the decision below, on the other hand, cannot both be right. The validity and scope of these hundreds of copyrights already issued, and the hundreds to be granted in the future, turns on the resolution of this conflict.

Confusion is never in the public interest. Certiorari should be granted.

Respectfully submitted,

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